Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LOUIS GINBERG,
Petitioner,

v.

LASZLO N. TAUBER,
Respondent.

Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia erred in ruling there was no Seventh Amendment right to a trial by jury of petitioner's claim for attorney's fees on the ground that it was an equitable claim in quantum meruit, where there was a factual dispute as to the existence of a fee agreement and its terms.

2. Whether the Court of Appeals erred when it extended *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988) beyond its facts to hold that the Seventh Amendment does not mandate a trial by jury for an attorney who sues his client to recover fees, where the existence and terms of the client fee arrangement are central issues to be tried.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the District of Columbia were petitioner Louis Ginberg and respondent Laszlo N. Tauber.

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REPORTS AND OPINIONS

The decision of the court of appeals is reported at 678 A.2d 543 (D.C. 1996).

STATEMENT OF JURISDICTION

The order of the court of appeals denying appellant's petition for rehearing or rehearing en banc was entered on August 5, 1996. The petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROFESSIONAL RULES INVOLVED

Seventh Amendment of the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

> jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Superior Court of the District of Columbia Rule 39(a):

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the Court or by an oral stipulation made in open court and entered in the record, consent to trial by the Court sitting without a jury or (2) the Court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or applicable law.

Rule 1.5(a) of the District of Columbia Rules of Professional Conduct:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly;
>
> (2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the result obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) Whether the fee is fixed or contingent.

STATEMENT OF THE CASE

Petitioner Louis Ginberg (hereinafter referred to as "Mr. Ginberg") is an attorney. For a number of years, he represented Dr. Laszlo Tauber (hereinafter referred to as "Dr. Tauber"), a multi-millionaire businessman and physician, in a variety of matters. Under their usual billing arrangement, Mr. Ginberg would submit a bill to Dr. Tauber when the matter was completed. In his bill, Mr. Ginberg would not itemize the number of hours devoted to each matter, but formulated his fees principally based on the quality and value of the result obtained, as well as on the complexity of the matter, how vigorously contested it was, and the effort required to achieve the desired result.

The litigation that created the fee dispute which is the subject of this action was the lengthy and complicated case of *Laszlo N. Tauber v. District of Columbia,* C.A. No. 48-82 L&T No. 2-82, which commenced in 1979 and involved three trials, a considerable motions practice and two appeals. The case was settled in 1991, with a recovery for Dr. Tauber of approximately $21 million. Except for periodic bills for costs advanced and a single bill relating to the first appeal, Mr. Ginberg did not bill Dr. Tauber while the litigation was pending. When settlement was imminent, Mr. Ginberg discussed his forthcoming bill with Dr. Tauber, who acknowledged his understanding that the bill would be based on the quality of the result obtained. When Mr. Ginberg submitted his final bill in the amount of $3,750,000.00, based chiefly on the quality of the result, Dr. Tauber refused to pay.

On July 2, 1991, Mr. Ginberg brought a claim for money damages in the Superior Court of the District of Columbia against Dr. Tauber for $3,750,000.00 in unpaid attorney's fees which he alleged were due him pursuant to their "result-based" fee agreement. In his complaint, he requested a jury trial. Subsequently the trial court entered partial summary judgment declaring that Mr. Ginberg was entitled to a fee. Mr. Ginberg's demand, pursuant

to Superior Court Rule 39(a), for a jury trial to determine the amout of the fee was denied, and a bench trial on that issue commenced before the Honorable Robert I. Richter on July 19, 1993.[1] At trial, Dr. Tauber did not deny that Mr. Ginberg was owed a fee for his services, but Dr. Tauber vigorously disputed that there had been an agreement as to the fee arrangement. He argued that Mr. Ginberg was owed a fee tied only to the hours he had expended in his representation of Dr. Tauber. Mr. Ginberg presented evidence at trial that, although there was no written fee arrangement, his claim that Dr. Tauber had agreed to a result-based fee was predicated on (1) a long-term prior course of dealing between the parties that principally considered the quality and value of the result obtained in formulating fees, (2) correspondence dated April 26, 1984 wherein Mr. Ginberg proposed a result-based fee arrangement, and (3) Dr. Tauber's acquiescence to the result-based fee arrangement in a meeting on March 6, 1991.

On July 22, 1993, Judge Richter returned a verdict for Mr. Ginberg in the amount of $389,788.75, ruling that there was no fee agreement and the only acceptable method for calculating Mr. Ginberg's fee was by application of the equitable doctrine of *quantum meruit*. Mr. Ginberg appealed the decision to the District of Columbia Court of Appeals. After the case was briefed and argued

[1] Ginberg's request for a jury trial on the issue of the amount of the fee was denied by the Honorable Richard S. Salzman, the original judge assigned to the action, who based his denial on *Kudon v. f.m.e. Corporation*, 547 A.2d 976 (D.C. 1988). Mr. Ginberg filed no motion for reconsideration of Judge Salzman's denial, but petitioned the Court of Appeals for a writ of mandamus seeking an order to Judge Salzman to reinstate the jury demand. This petition was summarily dismissed on March 26, 1992. Subsequently, on June 8, 1993, Mr. Ginberg moved for reconsideration of the pretrial ruling striking his demand for a jury trial. The Honorable Robert I. Richter, who had received the routine reassignment of the case, denied the motion for reconsideration on the ground that the summary denial of the writ of mandamus was the law of the case.

in January, 1995, the Court of Appeals affirmed on April 25, 1996. *Ginberg v. Tauber,* 678 A.2d 543 (D.C. 1996). Mr. Ginberg's Petition for Rehearing or Rehearing En Banc was denied on August 5, 1996.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECIDED THE CASE ON A FAULTY PREMISE THAT THE EXISTENCE OF A FEE AGREEMENT WAS NOT AT ISSUE.

The Court of Appeals held that the amount of Mr. Ginberg's fees was an equitable issue and ruled accordingly that Mr. Ginberg was not entitled to a jury trial at law on the issue. The ruling of the Court of Appeals misconstrues the nature of the case. Mr. Ginberg's action is premised on the breach by Dr. Tauber of an alleged agreement to pay "result-based" legal fees. In holding there was no agreement between the parties, "formal or otherwise, concerning how the amount of fees would be determined," *Ginberg v. Tauber,* 678 A.2d at 549, the Court of Appeals disregarded the following evidence introduced at trial:

1. The lengthy course of dealings between the parties in a series of prior cases, where Mr. Ginberg virtually always billed Dr. Tauber only at the end of a case, did not itemize the number of hours devoted to the matter, and took a number of factors into consideration in setting his fees, including the quality of the result obtained for Dr. Tauber, the complexity of the matter, and the size of the transaction;
2. Correspondence dated April 26, 1984, wherein Mr. Ginberg stated that "any further fee arrangements or discussion should await [the] outcome of this appeal or to see what may eventuate. I believe this would be the only fair way in this case to have a fee determination."
3. Mr. Ginberg's testimony that, in a meeting with Dr. Tauber following a settlement conference on March 6, 1991, an agreement was reached that

> Mr. Ginberg would be paid a "result-based" fee for representing Dr. Tauber, incorporating such factors as the quality of the result obtained, the difficulty of the case, and the time expended.

Although recognizing that "the manner in which [attorneys'] fees are calculated is . . . an "at law" question if there is a dispute on that point between the parties," *Ginberg v. Tauber,* 678 A.2d at 551, the Court of Appeals refused to recognize that the manner in which the attorney's fees are to be calculated is the very issue in dispute here. Following summary judgment in Mr. Ginberg's favor on his right to be awarded fees, the trial court applied the lodestar method to compute what it considered to be reasonable attorney's fees, disregarding Mr. Ginberg's claim that the alleged agreement controlled the amount of attorneys' fees to be awarded. In affirming, the Court of Appeals assumed away the central issue in this case, incorrectly premising its opinion on the notion that this was an action to recover attorney's fees based on *quantum meruit,* not an action to recover the amount of attorney's fees pursuant to a "result-based" contract. Yet whether or not the parties agreed to a "result-based" fee—which is the central question in dispute in this case—is a factual issue which belongs to the jury. *See Simler v. Conner,* 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691, 693 (1963) (whether the parties had reached an agreement concerning the payment of fees was an "at law" dispute which should have been submitted to a jury).

In addition, the Court of Appeals ruled that a court's presumed expertise in the issue makes a fee determination "one better left to the tral court to resolve." *Ginberg v. Tauber,* 678 A.2d at 549. Mr. Ginberg argued that Rule 1.5(a) of the District of Columbia Rules of Professional Conduct sets forth the proper factors to be considered in determining the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly;

(2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the result obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

A jury is capable of comprehending all of these factors. By imposing the lodestar method upon the facts of this case, the trial court made a factual finding concerning the method to use to determine the appropriate fees for Mr. Ginberg. A jury may well have made a different finding as to the parties' understanding regarding what constitutes reasonable attorney's fees.

II. THE DECISION BELOW, IN EXTENDING THE RULING OF *KUDON v. f.m.e. CORP.*, 547 A.2d 976 (D.C. 1988) BEYOND ITS FACTS, IMPERMISSIBLY NARROWS AN ATTORNEY'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY ON THE ISSUE OF ATTORNEYS' FEES.

The dispute in this case is legal rather than equitable. As this Court observed in *Simler v. Conner*, 372 U.S. 221, 223, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963), a controversy between a client and his lawyer over the amount of fees to be paid is " 'legal' in character." *See also McGuire v. Miller*, 1 F.3d 1306, 1314 (2d Cir. 1993) ("[T]he type of breach of contract suit, by one party to a services contract against another for damages, . . . was traditionally an action at law and thus triable to a jury

under the Seventh Amendment"). By timely requesting a jury trial on the issue of the amount of his fees, Mr. Ginberg exercised his Seventh Amendment right.

Kudon v. f.m.e. Corp., 547 A.2d 976 (D.C. 1988) is not dispositive here. In holding there was no Seventh Amendment right to trial by jury on lessor's contractual right to an award of attorney's fees for defending lessee's action, the *Kudon* court essentially ruled that an award of fees pursuant to a private contract provision is not part of the substantive claim but constitutes an "equitable cleaning-up" after the underlying claim. *Kudon v. f.m.e. Corp.*, 547 A.2d at 978-80. The ruling in *Kudon* is premised upon the equitable nature of attorney's fees which are awarded to a prevailing party in an action, whether or not the fees are authorized by a private contract provision between the parties. *Kudon* has no applicability to an attorney's claim against his client to recover payment for services rendered, where the substantive issue to be tried is what the fee agreement was between attorney and client. As Chief Judge Wagner stated in her dissent below:

> It does not appear that this court had either the intention, or the occasion in *Kudon*, to reject the jury trial right for an attorney's contractual claim for fees against his client which was upheld by the Supreme Court in *Simler v. Conner*, 372 U.S. 221, 223, and upheld in this jurisdiction in *Maddox v. Jinkens*, 66 U.S. App. D.C. 362, 363-64, 88 F.2d 744, 745-46 (1936), *cert. denied*, 301 U.S. 699 (1937).

Ginberg v. Tauber, 678 A.2d at 554.

Maddox v. Jinkens, supra, is a clear statement of the right of an attorney to sue at law for the amount claimed to be due him upon a contract for his services. In *Maddox*, an attorney representing a client in an injunction suit withdrew from representation and chose to present his claim for services by motion in the ongoing suit. Although holding that the attorney's claim for services

as presented was an ancillary and summary proceeding in equity, triable to the court alone, the court observed:

> The appellant was entitled to sue at law for the amount which he claimed to be due him from Miss Jenkins upon the contract for his services and he would be entitled to try such a case to the jury.

Maddox v. Jinkens, 66 U.S. App. D.C. at 364, 88 F.2d at 746.

What was at issue in the courts below is the existence or nonexistence of an agreement that Mr. Ginberg would be paid a "reasonable fee" based largely upon the quality of the result obtained. This is a plainly factual issue, legal in nature, to which a right to a trial by jury attaches. *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 2316 at 125-26 ("An action for damages for breach of contract is legal in nature and triable to a jury"). *See also Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44, 51 (1962), where this Court held that an action for money damages for breach of a written trademark licensing agreement presented a legal claim triable by jury as a matter of right, stating, "As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character." Since Mr. Ginberg has brought an action at law to enforce his contract rights, he is entitled to try the case to the jury.

Mr. Ginberg has been prejudiced by the denial of his right to a jury trial. By denying Mr. Ginberg his Seventh Amendment right to a trial by jury when the issue is a dispute over the amount of his fees, the courts below unfairly have placed attorneys, including Mr. Ginberg, in a different category than other professionals who have a right to a jury trial when they sue for payment for services. This disparate treatment merits consideration by this Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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